

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 38
5424515

BETWEEN JOHN CHAN
 Applicant

AND S & K LIQUOR LIMITED T/A
 MIRAMAR LIQUORLAND
 Respondent

Member of Authority: Trish MacKinnon

Representatives: John Chan on his own behalf
 Michael Fennessy, Counsel for the Respondent

Submissions received: 3 and 31 March 2014 for the Applicant
 20 February and 20 March 2014 for the Respondent

Determination: 23 April 2014

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination of 6 January 2014¹ I dismissed Mr Chan's claim to have been unjustifiably dismissed by the respondent, S & K Liquor Limited t/a Miramar Liquorland (Miramar Liquorland). The issue of costs was reserved. The parties have not resolved costs between themselves and the Authority has now received their submissions on the matter.

[2] Miramar Liquorland seeks a contribution to its costs in the sum of \$4,910.81. This includes \$300 for responding to the first statement of problem filed by Mr Chan before his dismissal, which it says was filed prematurely and was without merit. It also includes \$500 for the preparation of costs submissions.

[3] The respondent submits that a costs award in excess of the Authority's normal daily tariff is justified in this instance. This is because, as well as incurring the cost of having to respond to two applications made by Mr Chan to the Authority, the

¹ [2014] NZERA Wellington 1

applicant had rejected a *Calderbank* offer. The offer was for \$750 and had been made to him on 18 September 2013.

[4] Miramar Liquorland also provided evidence that it tried to resolve the matter of costs with Mr Chan by proposing he pay the sum of \$4,110.81. The letter it sent him had specified how that sum was calculated. It put him on notice that, in the event he did not agree with the proposal within 14 days, the respondent would be applying to the Authority for a higher costs award. Miramar Liquorland had received no response from Mr Chan to that letter.

[5] Mr Chan submits that, for a number of reasons, he should not have to contribute to the respondent's costs. Many of the reasons he cites have no relevance to a determination of the costs issue as they relate to Mr Chan's disagreement with the Authority's determination. They also relate to new matters he had not previously raised in the Authority but nonetheless submits should be taken into account. Neither of those new matters is relevant to this issue and I am unable to consider them in determining whether, and in what amount, costs should be awarded.

[6] Mr Chan further submits that he cannot afford to pay costs. He has provided no documentary evidence of this but notes that he has been unable to replace the part-time weekend employment from which the respondent dismissed him. Mr Chan made no reference to the full-time employment he had at the date of the investigation meeting. In the absence of evidence to the contrary I assume he still has that employment.

[7] Costs are at the discretion of the Authority. The principles relevant to costs awards are well-known and have been set out in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*². It is not necessary for me to reiterate them here. Suffice to say I have taken those principles into account when considering the submissions of the parties.

[8] One of the principles is that costs normally follow the event. I find it appropriate that they do so in this instance and that the *Calderbank* offer made by Miramar Liquorland should also be considered. The offer was a genuine one, made in a timely manner before the bulk of the respondent's litigation preparation had taken place. Mr Chan was given a reasonable length of time to consider the offer. The

² [2005] 1 ERNZ 808

respondent's legal costs were not out of the ordinary from the evidence put before the Authority. I find in these circumstances the *Calderbank* offer of \$750 should be accorded some weight.

[9] I do not find it appropriate to award the additional amount sought by the respondent for filing a statement in reply to the original application filed in the Authority by Mr Chan. In doing so I have considered Miramar Liquorland's response which revealed it had declined Mr Chan's request for mediation.

[10] Nor do I find it appropriate to raise the costs award to take account of the additional expense incurred by the respondent in applying for costs. Although it is sensible for parties to try to resolve the issue of costs between themselves, it would not be reasonable to penalise Mr Chan for not accepting an offer to resolve costs.

[11] The Authority's normal daily tariff is \$3,500. The investigation meeting took one day. Taking all the circumstances into account I find that a reasonable contribution towards Miramar Liquorland's costs is \$3,875.

[12] Accordingly I order Mr Chan to pay S & K Liquor Limited t/a Miramar Liquorland the sum of \$3,875 in costs pursuant to clause 15, Schedule 2 of the Employment Relations Act 2000.

Trish MacKinnon
Member of the Employment Relations Authority